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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 207

EMORY S. LAND (Chairman, United States Maritime Commission), HOWARD L. VICKERY (Vice Chairman, United States Maritime Commission), et al.,

Petitioners,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, THE J. HAROLD DOLLAR ESTATES COMPANY, et al.,

Respondents.

Brief of R. Stanley Dollar, Dollar Steamship Line, The J. Harold Dollar Estates Company, and H. M. Lorber in Opposition to Petition for Writ of Certiorari

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We respectfully submit that the case does not present any of the questions stated in the petition.

Furthermore, although this Court has said that except in extraordinary cases it does not issue a writ to review a decision that merely remands the cause for further proceedings and trial and is therefore not final (*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251; *Robertson and Kirkham, Jurisdiction*

of the Supreme Court of the United States, Section 308, p. 623), the petitioners are seeking a writ to review a decision of just that character.

Moreover, the grounds assigned by petitioners are that the questions supposedly presented are of "general importance." Those questions pertain to whether the action is one against the United States and therefore, so it is claimed, not maintainable without the consent of the sovereign. Even assuming that the questions once had general importance, since August 2, 1946, that is no longer so. On that day Public Law 601—79th Congress, known as the *"Legislative Reorganization Act of 1946,"* took effect. Title IV, known as the *"Federal Tort Claims Act"* (Secs. 401-424), waives immunity from suit in tort claims and provides for suit and judgment against the United States for money on account of damage to or loss of property or personal injuries caused by negligent or wrongful act or omission of any employee of the United States, officer or employee of any federal agency, acting within the scope of his office. The United States is declared to be liable to the same extent and in the same manner as private individuals. Since the sovereign has thus waived immunity in all cases arising after January 1, 1945, the extent of immunity before the passage of the statute is not a question of general importance.

STATEMENT

This action was begun in the District Court for the District of Columbia, which had jurisdiction under 18 D. C. Code, Sec. 41 as amended, 49 Stat. 1921 (cf. *Stark v. Wickard,* 321 U.S. 288), because defendants are residents of the District of Columbia. The present respondents were the plaintiffs in the District Court, and petitioners were the defendants.

The District Court dismissed the complaint, with prejudice, of its own motion (R. 79). At the time it took this action the only pleading on file was the complaint. Issue had not yet been joined, no motions had been made by defendants, and

the case was merely before the court on the plaintiffs' motion for a temporary injunction.

The only papers filed in the District Court by defendants prior to the dismissal were certain *ex parte* affidavits, and these had been presented only in opposition to the application for temporary injunction (so recited in the Judgment, R. 79). Certain portions of petitioners' statement of facts (pages 5, 6, 7, and first half of page 8) are predicated on one of these affidavits and are no proper part of the record upon which the case on appeal is to be decided.[1]

The District Court wrote no opinion. Disposing of the matter on the complaint alone, it made no findings. From its judgment of dismissal (R. 79) the plaintiffs appealed (R. 81), designating under Rule 75(d) of the *Rules of Civil Procedure* only one point on which they intended to rely on appeal, namely, that "The Court erred in dismissing plaintiffs' complaint" (R. 81). The Court of Appeals reversed and ordered the cause remanded, so that issue might be joined and the case determined on its merits (R. 171, 172).

Only two questions could conceivably be present in judging whether a District Court erred in dismissing any complaint as it did here: (1) Does the complaint state a claim for relief? and (2) does it state a case within the jurisdiction of the court?

Whether the complaint states a claim for relief may only be determined by reference to the complaint and acceptance of its allegations as true. Assertions and elaborations in affidavits objecting to the motion for temporary injunction may not be considered, "as these affidavits are a part of the record only for the purpose of determining the propriety of a temporary injunction." *Gibbs v. Buck*, 307 U.S. 66, 76; *Polk Company v.*

[1]The plaintiffs, as appellants, designated for the record on appeal only the complaint, judgment, and appeal papers (R. 159). The defendants, as appellees, required inclusion of the affidavits by counter designation (R. 160).

Glover, 305 U.S. 5, 8. Therefore the assertions on pages 5 to the middle of page 8 of the petition are improper. No motion for summary judgment was made, or, if it had been made, could properly have been granted (see p. 18, infra). Moreover, the question was not merely whether the complaint was deficient as a matter of pleading but whether it revealed that a cause of action could not be established under any state of facts which might by any possibility be proved in support of the claim. Otherwise a motion to dismiss does not lie.[2] *A fortiori*, where there was no motion to dismiss, no deficiencies in pleading were pointed out, and there was no opportunity to amend, dismissal for failure to state a claim was error.

The Court of Appeals held that the complaint does state a claim for relief against the defendants. Significantly, the petition does not contend otherwise. In short, petitioners now concede that a claim for relief is stated, and this concession strips any traces of merit from their jurisdictional contention.

Their jurisdictional contention is confined to a claim that the action is a suit against the United States. Apart from this, no doubt of jurisdiction exists (see page 2, supra). This "jurisdictional question," so raised by petitioners, is a spurious one. If the plaintiffs prove their cause of action, i.e., substantiate the allegations of their complaint, then the suit is not one against the United States. Conversely, if they fail to establish their allegations, their cause must be dismissed on the merits with no reference to jurisdiction.

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[2] *Atwood v. National Bank of Lima*, 115 Fed.2d 861 (6 Cir.); *Tahir Erk v. Glenn L. Martin Co.*, 116 Fed.2d 865 (4 Cir.); *Leimer v. State Mutual Life Assurance Co.*, 108 Fed.2d 302 (8 Cir.).

Rule 15 of the *Rules of Civil Procedure* provides that a party may amend as of course at any time before a responsive pleading is filed. Since defendants here filed no pleading, the liberal rules of pleading were summarily defeated by the District Court.

Plaintiffs did not sue the United States. The action was brought against five individuals who were members of the United States Maritime Commission at the time the complaint was filed. It was brought to recover personal property consisting of shares of stock of American President Lines, Ltd., a private corporation, and the certificates representing the shares. It is alleged that plaintiffs are the owners and have been since before 1938, that in 1938 the corporation was indebted to the United States Maritime Commission for a large sum of money (R. 6, Complaint, para. 30), that plaintiffs then pledged the shares to the Commission as collateral to secure the debt of the corporation (R. 6, Complaint, para. 29, 30), that thereafter and before the complaint was filed the debt was paid in full, and that defendants, who thus acquired possession, refuse to surrender the shares and threaten to sell them to others (R. 6, 7, Complaint, para. 33, 34). It is alleged that in August 1938 the plaintiff stockholders endorsed their certificates in blank and delivered them to the Commission under a written contract dated August 15, 1938, a copy of which is attached to the complaint as Exhibit A (R. 8).

The issue upon trial of this case will be the nature and effect of that contract. The respondents claim, and alleged in their complaint, that the contract created only a pledge as security for the indebtedness. The petitioners contend that it transferred title outright. They repeatedly assert in their petition[3] that the "United States" claims title to the stock and that the complaint alleges possession of the stock by petitioners "under a claim of absolute ownership by the United States." The petitioners thereby beg the issue. The United States has not claimed title or ownership. The claim that the United States has title is made by the individual petitioners as their defense against plaintiffs' charge of tortious violation of plaintiffs' ownership and right of present possession. The allegation of the complaint is not that the United States claims title but that (R. 6, para. 29):

[3] E.g., on page 3 in "Questions" 1 and 2, and on pages 9 and 16.

"although such transfer was in fact and in legal effect collateral security for the indebtedness of the company to the United States Maritime Commission, nevertheless after the satisfaction of all of said debts and obligations to the United States, *the defendants have asserted and claimed,* and do now assert and claim that the United States is the lawful owners of the shares of stock so transferred by the plaintiffs to the United States Maritime Commission."

ARGUMENT

A preliminary, though summary, discussion of respondents' claim on the merits is desirable for an understanding of the alleged jurisdictional question.

A.

THE COMPLAINT STATES A CLAIM FOR RELIEF AGAINST THE INDIVIDUAL DEFENDANTS

In passing on the ultimate issue whether the contract worked a pledge or an outright transfer of title, two different questions are presented, one a pure question of law and the other a question of mingled law and fact:

1. Had authority been conferred by law on the Maritime Commission to acquire title to the stock of a private corporation, outright, or was not its power limited to the acquisition of stock as collateral to secure a debt?

2. Assuming that the Commission had the power to acquire an outright title, nevertheless, what is the proper construction of this contract and this transaction?

The complaint raises both issues, the first in paragraphs 25, 31, 32 (R. 5, 6) and the second in paragraphs 29, 30 (R. 6). These are not inconsistent but independent claims, each leading to the same conclusion.

On the purely legal question, it is plain that the Commission could not and therefore did not acquire on behalf of the United

States more than the law empowered it to acquire, and that if Congress never conferred upon the Commission power to acquire title outright, any defendant now withholding possession from the owner would be acting outside of the authority conferred by law, could not defend his acts by invoking title or immunity of the United States, and would be guilty of a personal tort and subject to answer to the respondents.

Respondents' contention on this question is based on Section 207 of the *Merchant Marine Act of 1936*, 49 Stats. 1988, as amended (46 U.S.C. 1117), which is quoted in the complaint (R. 5) and partially in the petition (at p. 4). Although greatly discussed by all counsel and the court in oral argument, the Court of Appeals expressed no views on this subject in its opinion (R. 162-170) but based its decision on the second ground. We therefore do not now discuss the subject further. If, eventually, it is decided that the Commission had no authority to take outright title to corporate stock, respondents' right to a judgment automatically will follow. If the contrary is decided, it will become necessary to decide the second issue, that of mingled law and fact.

On this second issue, respondents' claim rests upon:

(1) Certain facts, and (2) certain legal principles. Some of the facts are:

(a) The contract does not state that it is an outright transfer and is wholly consistent with being a security transaction.

(b) On its face the contract contains the strongest evidence that it was only a security transaction.[4]

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[4]The Court of Appeals noted in its Opinion (R. 166; 154 Fed.2d 307, 309, 310):

> "As appellants argue, the terms of the contract seem in some respects to be more consonant with the theory of pledge than that of outright transfer. For example, it was specifically provided that appellees should acquire some 90% of the voting control of the company and have the power to sell the securities acquired. Neither of these

(c) Evidence dehors the face of the instrument demonstrates it to be a security transaction.[4]

Some of the legal principles are:

(a) Even if a contract appears on its face to be an absolute transfer, it may be deemed a mortgage or transfer as security, and evidence dehors the instrument may always be admitted.[5]

(b) In referring to the "real intention" or "real transaction" of the parties, the courts do not and may not limit themselves to any conscious or verbally expressed state of mind but allude to the essential nature of the transaction in the light of equitable principles. Thus they consider whether the debt continue to remain after the transfer,[6] as it did here, the contract expressly providing that it should remain (Para. 14, R. 13, 14). They apply the principle that once a debtor-creditor relationship ex-

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[5]*Cabrera v. American Colonial Bank*, 214 U.S. 224; 4 *Pomeroy's Equity Jurisprudence* (5th ed.), p. 583, Note 16.

[6]4 *Pomeroy's Equity Jurisprudence* (5th ed.), p. 583.

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conditions would appear necessary if the transfer was intended to be absolute. Further, some of the language used in the Commission's press release of July 6, 1943, tends to illustrate the genuineness of the 'claim' which appellants are asserting. In announcing that it was considering the 'possibility of bringing about private ownership of the American President Lines' the Commission's release said: 'Some of the debts of the Company were covered by debentures and preferred stock, and the Maritime Commission, *to protect its interests* and insure continuation of service, *came into possession* of 80 per cent of the common stock. Although the Commission had full voting control, it caused the Company to be operated by a Board of Directors which included representative local interests of San Francisco and former creditors of the concern.' (Italics added.) It would thus appear that perhaps the 'possession' acquired by the Commission to protect its 'interests' was, as appellants urge, nothing more than a bargain by which there was a substitution of collateral resulting in strengthening the Commission's position by reason of the management control inextricably bound to the transferred stock. We have no finding or conclusion from the trial court on this basic issue which we believe must be tried." [Italics are the court's]

ists, then, no matter what form the transaction or relation between the parties assumes, it remains in equity that of debtor and creditor. Conveyances by debtor to creditor are deemed to have been for purposes of security only, and when the debt is paid the property is to be restored. The equity of redemption is jealously protected, and the presumption may be overcome only by strong proof by the creditor. Where the creditor is in a position of strength and the debtor in a position of weakness, equity is particularly insistent that the original character of the relationship of the parties be not converted into a forfeiture of the debtor's title. The rules are especially applied where the record displays the application of pressure upon the debtor by the creditor.[7] All these circumstances are sufficiently delineated in the complaint.

Unless the transaction was a mere substitution of collateral, the harsh injustice is worked that the creditor has been paid its debt in full and yet remains the owner of 92% of the capital stock of the debtor which it received only because of the debt, all to the utter deprivation of the former owners. That construction works a forfeiture, and therefore is to be avoided unless no other is possible.[8]

(c) If there is doubt of the validity of a transaction, construed as an outright transfer of title, and it may be construed as a security transaction, it must be so construed, for a con-

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[7] 3 *Williston on Contracts* (Rev. ed.), Sec. 771, pp. 2171, et seq.; 4 *Pomeroy's Equity Jurisprudence* (5th ed.), Sec. 1193, pp. 568, 570; *Peugh v. Davis*, 96 U.S. 332; *Russell v. Southard*, 12 How. (U.S.) 138; *Conway v. Alexander*, 7 Cranch (U.S.) 218; *Villa v. Rodriguez*, 12 Wall. (U.S.) 323. As the contract here was made and executed in California, we also cite *Pierce v. Robinson*, 13 Cal. 116, 125; *Hickox v. Lowe*, 10 Cal. 197; *Hodgkins v. Wright*, 127 Cal. 688; *Montgomery v. Spect*, 55 Cal. 352 at 354; *Clarke v. Fast*, 128 Cal. 422, 61 Pac. 72.

[8] 3 *Williston on Contracts* (Rev. ed.), pp. 1786, 1787; *Ballard v. MacCallum*, 15 Cal.2d 439, 444; 101 Pac.2d 692.

struction that avoids invalidity or the necessity of passing on the question of invalidity thereof is always preferred.[9] The Comptroller General of the United States in his Annual Report to Congress for the fiscal year ending June 30, 1940 reported to Congress of this very transaction that the Commission's claimed acquisition of title was "under doubtful authority, to say the least." And General Counsel for the Maritime Commission, in an opinion rendered to it and appearing at page 108 of its Special Report to Congress, dated April 10, 1939, copy of which is Exhibit A-2 to the affidavit of Admiral Land (cf. R. 173), stated "that a careful study of the Merchant Marine Act of 1936 does not reveal that the Congress contemplated the type of government operation involved in the proposed transaction."

(d) The contract on its face, as well as extrinsic evidence (cf. footnote 4, supra), shows that the Commissioners were concerned with obtaining voting control so that they might control the management of the debtor in order to protect the obligation owing to the Commission and its security. A pledge would give the Commission all the protection it needed. The Commissioners' dominating motive was to control the management, and it is elementary that contracts are to be construed in the light of the main purpose or object.[10]

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[9] *Brierley v. Commercial Credit Co.*, 43 Fed.2d 724; cer. den. 282 U.S. 897; *Great Northern Railway Co. v. Delmar Co.*, 283 U.S. 686; *California Civil Code*, Sec. 3541; *Robbins v. Pacific Eastern Corporation*, 8 Cal.2d 241, 272; 65 Pac.2d 42, 58.

[10] 3 *Williston on Contracts* (Rev. ed.), Sec. 619, pp. 1781, 1782.

B.

THE SUIT IS NOT ONE AGAINST THE UNITED STATES, AND NO JURISDICTIONAL QUESTION IS PRESENTED.

This is not a suit against the United States but against certain individuals who, at the time the suit was commenced, had possession of property claimed by respondents to belong to them and withheld it from respondents despite demand.

No judgment against the United States is sought. No decision in the case will be *res judicata* with respect to the title of the United States, but only with respect to the rights of the parties *inter se*. Of course, if the United States were to become an actor in asserting a claim—i.e., a plaintiff or an intervenor, respondents would have their day in court. By raising the spurious jurisdictional question petitioners are actually seeking to deprive respondents of a day in court.

The fundamental starting point of the case is that respondents' rights are proprietary and not contractual in origin. In other words, respondents admittedly had title, that title was not derived from the United States and rested on no contract with the United States, and *they still have title unless petitioners establish that they lost it.* The only transaction by which it is claimed that the title was lost is the 1938 contract. Since the allegations of the complaint must be accepted at this stage, it must be taken that the 1938 transaction was only a pledge. Then, the debt having been paid, the lien was discharged by operation of law, and respondents, the owners, were entitled to the return of the possession by petitioners, the individuals who then had custody of the shares. The petitioners argue that an action to recover the shares is in effect a suit or specific enforcement of a contract of the United States to return the shares when the debt was paid. The argument ignores hornbook law. The right of the owner of pledged property to its return upon discharge of the debt does not originate in contract. An action

to vindicate those rights is not contractual; it was not at common law an action in assumpsit or debt but sounded in tort, being an action in replevin, or trover and conversion, or trespass. One who unlawfully retains possession, after the right to hold possession has ceased because the debt is paid, is guilty of a tort, of a common law conversion, is personally liable in damages to the owners, and may be compelled to return the property to the owners and those entitled to its possession. This is true also of anyone who, though lawfully gaining possession on his own behalf or as servant or agent of another, refuses to surrender on demand to him who is entitled to it, or who attempts to transfer to others (as the complaint alleges of defendants), or who, being in possession, denies the owners' title, as here. *Restatement of the Law of Torts*, Vol. 1, Sec. 237; *Restatement of the Law of Security*, Sec. 37.

Petitioners, arguing that the action is in the nature of a suit for specific performance, cite such cases as *Transcontinental & Western Air v. Farley*, 71 Fed.2d 288; *Wells v. Roper*, 246 U.S. 335; *Mine Safety Co. v. Forrestal*, 326 U.S. 371; *Boeing Air Transport v. Farley*, 75 Fed.2d 765; *Shoshone Irr. Dist. v. Ickes*, 70 Fed.2d 771; *Goldberg v. Daniels*, 231 U.S. 218, and *Hagood v. Southern*, 117 U.S. 52. In each of these cases plaintiffs had no rights except as they were created by and arose out of a contract with the United States. Upon breach or alleged breach of the contract by the United States, plaintiffs sued to enjoin the United States official from violating it, which was tantamount to an attempt to obtain specific enforcement by the United States or to collect a debt from it where the contract was for the payment of money, or plaintiff filed suit of similar character. In those cases, too, if plaintiffs had a case, they could seek relief in the Court of Claims, whereas in the present case the cause of action rests on a tort.

Petitioners also cite such cases as *Oregon v. Hitchcock*, 202 U.S. 60; *Minnesota v. Hitchcock*, 185 U.S. 373; *Louisiana v.*

Garfield, 211 U.S. 70; and *Morrison v. Work*, 266 U.S. 481. But those were cases where the title to land had been and was admittedly in the United States and where plaintiff sought to compel conveyance, claiming right to receive title under an act of Congress.[11] Nor is the present case a suit seeking interference with administrative discretion or performance of public duties under the law, such as fiscal duties, as was *Louisiana v. Jumel*, 107 U.S. 711, or with property admittedly that of the United States, as was *Belknap v. Schild*, 161 U.S. 10.

Here respondents claim no title under any law granting government property to them and rest no title on a contract with the United States. Their title antedated the contract, the contract of pledge has served its purpose, has been exhausted and is *functus officio*. The contract is invoked only as a basis of defense by the individual defendants and can serve as such only if construed as they would construe it.

One sued for trespass to, or conversion of, another's property may defend himself by establishing that title and right to possession belong to someone other than plaintiff. The issue of jurisdiction in this case is thus seen to be a spurious one. In order to prevail on the merits—to make out a successful defense—the petitioners seek to establish that the United States has title. If they establish that fact, the respondents lose their cause—not because of lack of jurisdiction, but because they have failed to establish their case on the merits. Conversely, if petitioners do not establish their defense, respondents are entitled to a judgment against them, for then—a necessary deduction from the premise—the suit is not one against the United States

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[11] Thus in *Oregon v. Hitchcock*, supra, it was said (p. 70):

> "Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. * * * Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

at all but against individuals acting without authority or defense under any law.

The instant case falls directly within the authority of *United States v. Lee*, 106 U.S. 196, the leading case on the subject and one which has been recognized in numerous decisions. The facts of that case are in every material respect the same as here. The suit was one to recover possession of property which had been in the possession of officers of the government for more than ten years. The defendants pleaded sovereign immunity, claiming that the property was property of the United States conveyed to it by a certificate of sale of a Tax Commissioner acting under public statute; in this case petitioners claim title under the terms of an agreement. The issue there was the validity of the tax sale. Here it is the effect of the 1938 contract. This Court rejected the attempt of the defendants in the *Lee* case to oust the court's jurisdiction and established the principle that an action against government officials as individuals is not converted into an action against the United States by their assertion that they have the right and authority under the law to take or hold title for the United States. They must prove their authority; if they prove it, they establish their defense on the merits, but the jurisdiction of the court to decide the merits is unimpaired.

The petition asserts in footnote 12 that the *Lee* case is inapplicable because a judgment against petitioners in their individual capacities would not give respondents the relief they ask. The assertion is mistaken. In the *Lee* case the plaintiffs recovered possession of the land and the individual defendants were ordered to surrender it, although plaintiffs' title was not quieted against the United States (cf. 106 U.S. 196 at 197, 221, 222). Precisely the same relief may be granted here.

If the law were otherwise, officers would be free to seize and hold property at will, citizens leasing or chartering property to the government for a term would be unable to gain a

hearing in court if officials in possession refused to surrender at the expiration of the term, and in general citizens would be helpless against irresponsible officials. The law is clear that this is not so. It has been repeatedly held that agents of the government who claim to act for the sovereign in the possession of property must establish its title or right to possession. *United States v. Lee*, supra; *Cunningham v. Macon & B. R. Co.*, 109 U.S. 446, 452.[12] As stated in *Correa v. Barbour*, 71 Fed.2d 9, 12:

> "It is true that the defendant cannot prove that he was in possession under lawful authority without showing that the United States had good title to the land giving it authority to authorize him to enter and possess the land. But in establishing his authority, the right and title of the United States is not at issue in the suit, but is a mere matter of evidence going to prove the character of the authority under which he holds possession . . ."

So also, *Tindal v. Wesley*, 167 U.S. 204; *Ickes v. Fox*, 300 U.S 82; *Morrison v. Work*, 266 U.S. 481; *Philadelphia Co. v. Stimson*, 223 U.S. 605.

In an enlightening discussion of the subject of sovereign immunity from suit, this Court in *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, showed that the legislative policy of Congress is in the direction of limiting, not of extending, that immunity, and that the present climate of opinion has brought government immunity into disfavor. So also, *Cherry Cotton Mills v. United States*, 326 U.S. ....., 90 L.Ed. (Adv. Op.) 704, 706. By the *Federal Tort Claims*

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[12]In the *Cunningham* case, this Court, in following the *Lee* case, said:

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.
>
> "In these cases he is not sued as, or because he is, an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." [Italics are the court's].

Act, enacted August 2, 1946, the United States has waived immunity from suit in tort cases (Public Law 601—79th Congress, Title IV, Sec. 401, et seq.). The Report to the House on this Act by the Joint Committee on the Organization of Congress stated (p. 35) "the Government should be put in the same position as any private party," and quoted (at pp. 35, 36) from a previous House Committee report (H. Rept. No. 1287, 79th Cong., 1st sess.):

> "For many years the present system has been subjected to criticism . . . and as being unjust to the claimants, in that it does not accord to injured parties a recovery as a matter of right . . .
>
> * * * * * * *
>
> "As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the Government in respect to any common-law tort. The existing exemption in respect to common-law torts appears incongruous. Its only justification seems to be historical."

It is in this climate of opinion that petitioners seek to attach immunity to a suit of a character in which ever since the *Lee* decision over 60 years ago it has been settled that there is no immunity.

Impropriety of a Summary Disposition of the Issue by the District Court

The effect of the argument made by petitioners below was that they can deprive the court of jurisdiction to determine the propriety of their conduct by the bare assertion by them of title in the United States. That argument being thus clearly unsound, their petition recedes somewhat from it and now urges that on the so-called "jurisdictional issue" the court may make a summary disposition by trying the question on *ex parte* affidavits. But since the so-called jurisdictional question is identically the same as the merits of the case, petitioners' request is quixotic

because it asks the court to dispose of the merits summarily on affidavits, under the disguise of jurisdiction, *for the purpose of denying the plaintiffs a full trial on the merits in the usual manner of the law; in short, in order to deny to plaintiffs the full opportunity to prove their right to prevail on the merits.*[13]

On this type of "jurisdictional question," if it can be so denominated, the request is improper because the court is "obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove" the allegations of their complaint. *Ickes v. Fox,* 300 U.S. 82, 96. They are deemed established for purposes of jurisdiction until opportunity is had to prove them at the trial.

Moreover, the affidavits on which petitioners now rely were filed only for the purpose of opposing plaintiffs' motion for an interlocutory injunction and are available only in that connection (*Gibbs v. Buck,* 307 U.S. 66; *Polk Company v. Glover,* 305 U.S. 5, 8). Respondents were never apprised in the District Court that they were called on to respond to the affidavits in any other connection. There was no motion for a summary judgment and no speaking motion to dismiss.[14] Petitioners made *no* motions at all.

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[13] We observe in footnote 8 on page 12 of the petition a curious inversion of regular procedure in the statement:

> "Since the court below settled the jurisdictional defense adversely to petitioners, further proceedings in the district court would necessarily consist of a formal trial to establish facts already of record."

Facts are to be established by trial; trials may not be avoided by prejudging facts. Plaintiffs are entitled to a trial to introduce their evidence in an orderly way. Cf. *Myers v. Bethlehem Corp.,* 303 U.S. 41, at 51, 52: "Lawsuits also often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

[14] A speaking motion is treated by the courts which recognize its use as governed by the same principles as a motion for summary judgment. Cf. cases cited in 1 *Moore's Federal Practice,* 1945 Supp., pp. 260-264. The Second Preliminary Draft of Amendments to Rules of Civil Procedure (in proposed Rule 12b) specifically would permit speaking motions but states that they are to be treated as motions for summary judgment.

Obviously, too, the District Court could not on its own motion make a disposition of the case which it could not make on a motion for summary judgment. And the present case is not one in which a summary judgment on the merits could be granted to petitioners. Such a judgment may be granted only if it appears that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Rules of Civil Procedure*, Rule 56, Subd. (c). On a motion for summary judgment the court may only decide whether there is an issue—it may not decide the issue (see 3 *Moore's Federal Practice*, p. 3184, and the numerous cases cited in the 1945 Pocket Supplement at pages 177-180). Such a motion may not be perverted to the trial of disputed questions of fact upon affidavits; it is no substitute for existing methods of trials of issues of fact. It can only be granted upon evidence which a jury would not be permitted to disbelieve in a jury case and which would require a directed verdict. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620; *Arenas v. United States*, 322 U.S. 419; *Ryan v. Broderick*, 59 F. Supp. 189; 3 *Moore's Federal Practice*, p. 3184; *Walsh v. Walsh*, 18 Cal.2d 439, 444, 116 Pac.2d 62; *Gravenhorst v. Zimmerman*, 236 N.Y. 22, 139 N.E. 766, 772. And an affidavit is not proof contradictory to well pleaded facts in a complaint. *Farrall v. District of Columbia Amateur Athletic Union*, 153 Fed.2d 647. It follows that, where a case involves the construction of a contract and a determination of its nature and effect, a summary judgment is improper where extrinsic evidence is admissible to assist in the construction. And it has so been held. *Walsh v. Walsh*, supra; *Gibson v. De La Salle Institute*, 66 C.A. 2d 609, 152 Pac.2d 774.

These principles are not avoided by calling the issue a "question of jurisdiction." On this subject petitioners cite cases where the jurisdictional question was one of citizenship or the amount in controversy, but even the principles applicable to those questions do not support petitioners. Upon the authority

of those cases, petitioners argue that the burden of supporting jurisdiction of a federal court rests on the plaintiff. But plaintiffs (respondents) at this juncture ask only for a trial at which they will have the opportunity to support whatever burden of proof may rest upon them.

Upon those cases petitioners also urge that the jurisdictional inquiry may precede a trial on the merits and that the court may of its own motion require the jurisdictional facts to be established by evidence. But, where preliminary jurisdictional inquiry shows that the question is identical with the merits, a plaintiff is entitled to introduce his evidence at a proper trial and not to be relegated to a contest of *ex parte* affidavits. It is beside the point to cite cases where the very facts alleged in the complaint negative jurisdiction (e.g., *Oregon v. Hitchcock*, 202 U.S. 60; *Transcontinental & Western Air v. Farley*, 71 Fed.2d 288; *Myers v. Bethlehem Corp.*, 303 U.S. 41), or cases where, the action having gone to trial and judgment, there was no evidence and no finding to sustain the traversed jurisdictional allegations of the complaint (e.g., *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178). It is also beside the point to cite cases holding that a defendant before answer may by motion traverse the allegations of jurisdiction and place plaintiff on proof (e.g., *KVOS, Inc. v. Associated Press*, 299 U.S. 269), for petitioners made no motion. Even where the court of its own motion causes jurisdictional inquiry to be made, it must do so "either by having the proper issue joined and tried, or by some other form of appropriate proceeding" (*Wetmore v. Rymer*, 169 U.S. 115, 122). The plaintiff must be apprised that he is called on to give evidence; here plaintiffs were never apprised that they were expected to engage in preliminary trial of the merits to protect the jurisdiction. Further, where the issue is one of fact intermingled with the merits, the only appropriate way to try the issue is by regular trial. In such a case, too, the evidence to sustain the jurisdiction in the preliminary inquiry need not be as clear as that to establish the fact on

the merits, because a "suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within the jurisdiction, unless the facts, when made to appear on the record, *create a legal certainty* of that conclusion" (*Wetmore v. Rymer*, supra, p. 128, reversing).

Furthermore, unlike in *KVOS, Inc. v. Associated Press*, supra, the plaintiffs' case on jurisdiction does not rest on a bare allegation in the complaint. Here the 1938 contract is an exhibit attached to the complaint; that contract as well as certain exhibits attached to petitioners' affidavits are more consonant with a pledge than an outright transfer of title; the Court of Appeals so held and the petition does not challenge that conclusion (see footnote 4, supra). There being no findings by the District Court, there is no basis for a jurisdictional argument now. *Wetmore v. Rymer*, supra, shows that even in a case involving jurisdictional amount, where the trial court decides to try that issue itself rather than let it go to the jury, "its action must take a form that will enable this Court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court." Here it is patent *that the District Court did not even presume to try and decide any question of fact.*

Lack of Findings and Academic Nature at This Time of Questions Raised by Petitioners.

The petitioners are asking this Court to assume a burden which it is improper to impose upon it. Since the District Court rendered no opinion and made no findings, the only indication of the basis upon which it dismissed the cause appears in a statement made by it from the Bench (R. 152, quoted in the petition at p. 11):

> "I. think * * * this transaction was legal, in the sense that the Commission had the legal right; and therefore * * * it is incapable that this is a suit against the United States * * *."

Apparently it concluded that under Section 207 of the *Merchant Marine Act of 1936* the Commission had legal authority to acquire outright title to shares in private corporations and was not restricted to acquiring stock only as security. Proceeding from this premise alone, it arrived at its jurisdictional conclusion. But the conclusion does not follow from the premise. Assuming the premise, there remains the question of fact whether the particular transaction of 1938 was a pledge or an outright transfer. If this Court should now decide that the Commission had no legal authority to acquire outright title, summary judgment for respondents would be in order (see pp. 6, 7, supra). But if this Court were to decide that the Commission had authority to acquire outright title, no judgment for petitioners follows because the question of fact still remains. The complaint alleges that the transaction was a pledge, and at the pleading stage the allegation must be taken as correct. If the proof at a trial supports the pleading, on that question of fact, the question of legal authority becomes academic. This Court should not be asked to grant a writ of certiorari to decide what may prove to be an academic question, and for that reason has ordinarily denied writs of certiorari to review decisions of Circuit Courts of Appeal that do not terminate the cause (*Hamilton-Brown Shoe Co. v. Wolf Bros & Co.*, 240 U.S. 251, 258; *Robertson and Kirkham, Jurisdiction of the Supreme Court*, p. 623). Essential facts should be determined before grave questions are passed upon, "and that determination requires a hearing in due course upon the issues raised by the pleading." *Polk Company v. Glover*, 305 U.S. 5, 10. Moreover, if the question ever reaches this Court in orderly process after trial, and it can do so only if the question of fact is decided adversely to respondents, it should and will come with an opinion of the Court of Appeals on the subject, so that this Court may have the benefit of that court's views (*Brown v. Fletcher*, 237 U.S. 583; *United States v. Ballard*, 322 U.S. 78, 88).

Furthermore, on the issue of fact this Court should not be asked to review the case until the trial court has made findings

of fact, as it must do after a trial and as it has not yet done. *Panama Mail S.S. Co. v. Vargas*, 281 U.S. 670; *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316; *Borden's Co. v. Baldwin*, 293 U.S. 194, 213.

Suability of United States Maritime Commission, as Such

The petition seeks to present to this Court the question whether the United States Maritime Commission, as an agency of the United States, was a suable entity.

The Federal Tort Claims Act, enacted August 2, 1946 (see pages 2 and 16, supra) makes the United States directly liable for torts of the Commission. Whether the Commission was a suable entity before August 2, 1946 is therefore not now a question of general importance. Moreover, it is not presented in this case. The Court of Appeals did not base its judgment on a determination of that question but, resting on the principle of *United States v. Lee*, supra, held that the suit was one against individuals. Its reflections on the suability of the Commission were prefaced by the remark:

> "While it does not alter the basic problem under consideration we observe another facet of the jurisdictional question which buttresses our conclusion to reject the defendant's claim of immunity at this time." [154 F.2d 307 at 311]

This Court should not be asked to grant a writ to review an abstract question which has no future importance and upon which decision of the case does not rest (cf. *Alpha Steamship Corp. v. Cain*, 281 U.S. 642). If the question is necessary to decision after a trial, it will be time enough to consider it then.

CONCLUSION

We respectfully submit that the petition should be denied.

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